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M.L., Appellant)	
)	
and)	Docket No. 15-1683
)	Issued: June 20, 2016
)	
U.S. POSTAL SERVICE, PROCESSING &)	
DISTRIBUTION CENTER, West Sacramento, CA,)	
Employer)	
)	

Case Submitted on the Record

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

On August 3, 2015 appellant filed a timely appeal from a May 26, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

³ Appellant submitted new evidence with his appeal. The Board, however, has no jurisdiction to review evidence on appeal which was not before OWCP at the time of its final decision. See 20 C.F.R. § 501.2(c)(1).

ISSUES

The issues are: (1) whether appellant received a \$3,482.53 overpayment of compensation for the period January 8 to February 7, 2015; and (2) whether OWCP properly found appellant at fault in the creation of the overpayment and, therefore, not entitled to waiver of recovery.

On appeal appellant contends that his scheduled return to work was delayed and his leave was extended because he had undergone another surgery.

FACTUAL HISTORY

On September 17, 2013 appellant, then a 46-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that he sustained a left shoulder rotator cuff injury when his shoulder popped on that day as he was picking up a package. He stopped work on the date of injury.

OWCP initially denied the claim, but on January 7, 2014 it accepted appellant's claim for a left shoulder strain. It advised him that, to avoid an overpayment of compensation, he was to immediately notify it of his return to work. OWCP further advised appellant that he was required to return any check to OWCP which included a period during which he worked.

On June 2, 2014 appellant underwent authorized left shoulder arthroscopy superior glenoid labral posterior section repair, acromioplasty, Mumford procedure, debridement of an articular-sided cuff tear, and open biceps tenodesis for a superior and posterior glenoid labral tears, partial thickness cuff tear, perilabral cyst impingement, and acromioclavicular arthritis.

Appellant received wage-loss compensation beginning June 2, 2014. On June 12, 2014 appellant elected to receive his compensation payments through direct deposit.⁴

On December 5, 2014 appellant underwent authorized left shoulder arthroscopic lysis of subacromial and subdeltoid adhesions.

In a January 5, 2015 report, Dr. Richard D. Tortosa, a Board-certified orthopedic surgeon, advised that appellant was unable to return to work until approximately January 8, 2015. On February 5, 2015 he released appellant to return to work with no restrictions on that date.

OWCP issued an electronic compensation payment on January 10, 2015 in the net amount of \$3,055.65, covering the period December 14, 2014 to January 10, 2015. It issued another electronic compensation payment on February 7, 2015 in the net amount of \$3,009.51, covering the period January 11 to February 7, 2015.

On February 26, 2015 the employing establishment informed OWCP that appellant had returned to work on January 7, 2015. On March 3, 2015 it confirmed that he had returned to full-

⁴ The record reflects that appellant began receiving wage-loss compensation beginning June 2, 2014 and that he was placed on the periodic compensation rolls beginning June 29, 2014.

time light-duty work with no wage loss on January 8, 2015. The employing establishment noted that appellant had been released to full-time full-duty work on February 5, 2015.

By letter dated March 4, 2015, OWCP made a preliminary determination that appellant received an overpayment of compensation in the amount of \$3,482.53 from January 8 to February 5, 2015 because he continued to receive disability compensation after his return to work. It calculated the overpayment by noting that during the 31-day period from January 8 to February 7, 2015 appellant received gross compensation in the amount of \$3,810.77 based on a daily gross compensation rate of \$122.93. OWCP then subtracted \$254.77 for health benefits, \$19.60 for basic life insurance, and \$53.87 for optional life insurance for the same period to calculate a total net overpayment of \$3,482.53. It found that appellant was with fault in the creation of the overpayment because he was aware or should have been reasonably aware that he was not entitled to receive wage-loss compensation benefits after returning to full-time work. OWCP requested that he complete an overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documents. Additionally, it notified appellant that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence, or a precoupment hearing. An overpayment worksheet dated March 4, 2015 determined that appellant was overpaid during the period January 8 to February 7, 2015 for a total of \$3,482.53.

Appellant did not respond to the preliminary overpayment determination. In a May 26, 2015 decision, OWCP finalized the preliminary overpayment determination, finding that appellant had received an overpayment of compensation in the amount of \$3,482.53 from January 8 through February 5, 2015. It further found that he was at fault because he knowingly accepted wage-loss compensation to which he was not entitled. OWCP directed that appellant forward payment for the full amount or to contact it to make other repayment arrangements.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.⁵ Section 8129(a) of FECA provides, in pertinent part, “When an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.”⁶

Section 8116 of FECA defines the limitations on the right to receive compensation benefits. This section of FECA provides that, while an employee is receiving compensation, he or she may not receive salary, pay or remuneration of any type from the United States, except in limited circumstances.⁷ OWCP regulations provide that compensation for wage loss due to

⁵ *Supra* note 2 at § 8102(a).

⁶ *Id.* at § 8129(a).

⁷ *Id.* at § 8116(a); *R.H.*, Docket No. 09-1981 (issued June 11, 2010).

disability is available only for any periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury.⁸

A claimant is not entitled to receive temporary total disability and actual earnings for the same period.⁹ OWCP procedures provide that an overpayment in compensation is created when a claimant returns to work, but continues to receive wage-loss compensation.¹⁰

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$3,482.53 for the period January 8 to February 7, 2015. OWCP accepted appellant's claim and paid appropriate wage-loss compensation benefits. Appellant returned to full-time light-duty work on January 8, 2015. As of that date, he was no longer entitled to wage-loss compensation benefits.¹¹ After appellant returned to work, OWCP made automatic payments of compensation in the net amount of \$3,055.65 on January 10, 2015 and \$3,009.51 on February 7, 2015. The payments were made by direct deposit covering the period December 14, 2014 to February 7, 2015.

OWCP calculated that for the 31-day period from January 8 to February 7, 2015, appellant received an overpayment of compensation in the amount of \$3,810.77, based on a daily gross compensation rate of \$122.93 less deductions for health benefits of \$254.77, basic life insurance of \$19.60, and optional life insurance of \$53.87, for a net compensation of \$3,482.53. The Board has reviewed OWCP's calculations and finds that it properly determined that appellant received an overpayment of compensation in the amount of \$3,482.53.

The Board notes that OWCP's March 4, 2015 preliminary determination and May 26, 2015 decision revealed that the overpayment period ended on February 5, 2015. The calculations provided, however, used February 7, 2015, in accordance with appellant's compensation history. Accordingly, the Board will affirm OWCP's May 26, 2015 decision on the issues of fact and amount of overpayment, but will modify the period of the overpayment to January 8 to February 7, 2015.

LEGAL PRECEDENT -- ISSUE 2

Under OWCP regulations, waiver of the recovery of an overpayment may be considered only if the individual to whom it was made was not at fault in accepting or creating the overpayment.¹² The fact that the overpayment was the result of error by OWCP or another

⁸ 20 C.F.R. § 10.500.

⁹ See *R.W.*, Docket No. 13-1285 (issued November 13, 2013).

¹⁰ See *Danny E. Haley*, 56 ECAB 393 (2005); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2a (May 2004).

¹¹ *Supra* notes 9 and 10.

¹² *Supra* note 8 at § 10.433(a).

government agency does not by itself relieve the individual who received the overpayment of liability for repayment if the individual also was at fault for receiving the overpayment.¹³ Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she received from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events that may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment: (1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (2) failed to provide information which he or she knew or should have known to be material; or (3) accepted a payment which he or she knew or should have known to be incorrect (this provision applies only to the overpaid individual).¹⁴

The Board has found the claimant to be at fault in cases where he or she is receiving compensation checks through direct deposit involving a series of payments over several months with clear knowledge that the payments were incorrect.¹⁵ It is not appropriate, however, to make a finding that a claimant has accepted an overpayment *via* direct deposit until such time as a reasonable person would have been aware that this overpayment had occurred. This awareness could be established either through documentation such as a bank statement or notification from OWCP or where a reasonable period of time has passed during which a claimant could have reviewed independent confirmation of the incorrect payment.¹⁶

ANALYSIS -- ISSUE 2

OWCP determined that appellant was at fault in the creation of the overpayment because he accepted payments that he knew or reasonably should have known were incorrect. The Board finds that he was without fault with regard to OWCP's first direct deposit following his return to work, but he was at fault in creating the overpayment resulting from the second such deposit.

OWCP records indicate that on January 10, 2015 appellant received a net direct deposit payment of \$3,055.65 for the period December 14, 2014 to January 10, 2015, and that on February 7, 2015 he received a net direct deposit payment of \$3,009.51 for the period January 11 to February 7, 2015. As explained, since appellant returned to work without wage loss on January 8, 2015, he was not entitled to all of these payments. OWCP calculated that these payments resulted in an overpayment of \$3,482.53 for the period January 8 to February 7, 2015. It found appellant at fault in creating the overpayment as he was aware or should have been aware that he was not entitled to wage-loss compensation after his return to full-time work.

The Board has held that an employee who receives payments from OWCP in the form of direct deposit is not at fault the first time incorrect funds are deposited into his or her account, as

¹³ *Id.* at § 10.435(a).

¹⁴ *Supra* note 12; *see Sinclair L. Taylor*, 52 ECAB 227 (2001); *see also* 20 C.F.R. § 10.430.

¹⁵ *See Karen K. Dixon*, 56 ECAB 145 (2004).

¹⁶ *Tammy Craven*, 57 ECAB 689 (2006).

the acceptance of the resulting overpayment lacks the requisite knowledge.¹⁷ Previous cases have held that receiving an erroneous direct deposit payment immediately following the employee's return to work does not necessarily create the requisite knowledge to find that a claimant was at fault in the creation of the overpayment.¹⁸ However, the Board has found fault in cases where incorrect payments were made over longer periods of time or for substantially greater amounts than previously received.¹⁹ The Board has noted that an employee's failure to return an overpayment is immaterial to the issue of whether he was at fault in its creation.²⁰

The Board finds that appellant was without fault regarding the first direct deposit payment which he received on January 10, 2015 in the amount of \$3,055.65, covering the period December 14, 2014 to January 10, 2015. While appellant accepted the overpayment by gaining control of the funds deposited into his account pursuant to his authorization, he did not know that he would receive an incorrect payment on that day. Unlike the situation in which a claimant receives a physical check and is aware of the amount of the payment before depositing it into his account, he was not on notice of the amount of the payment until after it was deposited electronically into his account.²¹ OWCP has not presented sufficient evidence to establish that appellant accepted a payment at the time of deposit which he knew or should have known to be incorrect.²² Appellant had no reason to suspect at the time of the January 10, 2015 deposit that OWCP had issued an incorrect payment since this was the first payment made. Thus, the Board finds that he was not at fault in creating that portion of the overpayment received on January 10, 2015. A finding that appellant was not at fault with respect to the January 10, 2015 direct deposit payment does not establish that he was entitled to waiver of recovery of that portion of the overpayment and therefore the case shall be returned to OWCP. On return of the case record, OWCP should properly consider the issue of waiver of this portion of the overpayment.²³

The Board finds, however, that appellant was at fault in the creation of the overpayment resulting from the February 7, 2015 direct deposit. In a January 7, 2014 letter, appellant was notified that, to avoid an overpayment of compensation, he must immediately notify OWCP of his return to work. Appellant was required to return any check to OWCP which included a period during which he worked. After his receipt of the first direct deposit following his return to work, he was on notice that OWCP was making payments to him in error. Appellant knew or should have known that he was not entitled to the benefit of subsequent direct deposits. When he

¹⁷ *Id.*

¹⁸ *V.S.*, Docket No. 13-1278 (issued October 23, 2013); *W.P.*, 59 ECAB 514 (2008).

¹⁹ *W.P.*, *id.*

²⁰ *Id.* (that appellant spent the money or had more than ample opportunity to return it before the preliminary finding of fault is immaterial to whether he was at fault in creating the overpayment).

²¹ *W.P.*, *supra* note 18.

²² *V.A.*, Docket No. 12-637 (issued August 27, 2012).

²³ *See D.B.*, Docket No. 14-397 (issued June 3, 2014); *M.F.*, Docket No. 12-456 (issued November 13, 2012); *supra* note 16.

received the second deposit on February 7, 2015 in the amount of \$3,009.51 for the period January 11 to February 7, 2015, he had been back at work since January 8, 2015 and would have had no expectation of that compensation. In light of OWCP's clear mandate to provide notification of a return to work and to return any payment received, which included a period during which appellant worked, a reasonable person would have known that an overpayment had occurred. Appellant had the benefit of reviewing bank statements reflecting his receipt of this additional compensation payment. The Board finds that he knew or should have known that the February 7, 2015 deposit covering the period January 11 to February 7, 2015 was in error.²⁴ Appellant had an obligation to return payments that he knew or should have known were incorrect.²⁵ Therefore, he was at fault in creating this portion of the overpayment and is not entitled to waiver of recovery of the overpayment.²⁶

CONCLUSION

The Board finds appellant received a \$3,482.53 overpayment of compensation for the period January 8 to February 7, 2015. The Board finds that OWCP's finding of fault for the portion of the \$3,482.53 overpayment for the period December 14, 2014 to January 10, 2015 is reversed and the case is remanded to OWCP to determine whether waiver of the recovery of the overpayment is warranted. The Board finds, however, that OWCP properly found that appellant was at fault for the remaining portion of the \$3,482.53 overpayment for the period January 11 to February 7, 2015 and, therefore, ineligible for waiver of the recovery.

²⁴ *Neill D. Dewald*, 57 ECAB 451 (2006).

²⁵ *Id.*

²⁶ The Board does not have jurisdiction to review the recovery of the overpayment. The Board's jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA. *See* 20 C.F.R. § 10.441(a); *L.D.*, 59 ECAB 673 (2008).

ORDER

IT IS HEREBY ORDERED THAT the May 26, 2015 decision of the Office of Workers' Compensation Programs is affirmed as modified in part and reversed in part, and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: June 20, 2016
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board